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No. [redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1968

MAKAH INDIAN TRIBE, as a tribe and as a federal corporation, on its own behalf and on behalf of each of its members, APPELLANTS

v.

TAX COMMISSION OF THE STATE OF WASHINGTON; GEORGE KINNEAR, TAX COMMISSIONER AND CHAIRMAN OF THE TAX COMMISSION OF THE STATE OF WASHINGTON, AND JANE DOE KINNEAR, HIS WIFE; G. MERTON DICK, TAX COMMISSIONER OF THE STATE OF WASHINGTON, AND JANE DOE DICK, HIS WIFE; CLARK SQUIRE, TAX COMMISSIONER OF THE STATE OF WASHINGTON, AND JANE DOE SQUIRE, HIS WIFE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

ERWIN N. GRISWOLD,
Solicitor General,

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OCTOBER TERM, 1967

No. 1280

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MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

This memorandum is submitted in response to the Court's order of May 20, 1968, inviting the Solicitor

General to state the views of the United States with respect to the case.

The State of Washington imposed an excise tax upon the "sale, use, consumption, handling or distribution" of cigarettes which is collected by the use of stamps which are affixed to the package by wholesalers or distributors (Pet. App. D 10-16). The appellant, the Makah Indian Tribe, contests that tax as applied to cigarettes ultimately sold by retailers within the Makah Indian Reservation. The trial court and the Supreme Court of Washington have refused to enjoin collection of the tax, holding that when the tax is imposed the cigarettes are in the hands of wholesalers conducting business wholly outside the Indian Reservation and that it was not specifically directed at trading on the Indian Reservation and had no substantial effect on such trading. These circumstances, the court held, distinguished *Warren Trading Post* v. *Tax Commission*, 380 U.S. 685.

It does not appear that the power here asserted by the State of Washington conflicts in any way with the authority exercised by the Secretary of the Interior over Indian Reservations, nor would it impose any direct burden on trading in the Reservation. As this Court noted in *Warren*, *supra*, at 690, n. 14, the federal statutes and regulations as to Indian traders apply "only to activities on reservations." Here the tax is imposed on wholesalers, who are engaged in business outside the reservation. We do not believe that the subsequent transfer of some of the cigarettes to retailers upon the Reservation for sale to Indians or non-Indians invalidates the tax. Analogies refus-

ing to extend the federal immunity from state taxation to instances where the economic burden of a tax might be passed on to the government would seem to support the decision in this case. *E.g.*, *Penn Dairies* v. *Milk Control Comm'n. of Pennsylvania*, 318 U.S. 261; *Alabama* v. *King & Boozer*, 314 U.S. 1, 8-9. See, also, *United States* v. *Boyd*, 378 U.S. 39.

Accordingly, we submit the Court might appropriately dismiss the appeal for want of a substantial federal question.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

CLYDE O. MARTZ,
Assistant Attorney General.

ROGER P. MARQUIS,
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JUNE 1968.

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PER CURIAM

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

MAKAH INDIAN TRIBE *v.* TAX COMM'N OF STATE OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 52. Decided October 14, 1968.

PER CURIAM.

The motion is dismiss is granted and the appeal is dismissed for want of a substantial federal question.